SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-920

BERNARD W. McNAMARA, *et al.*,
Petitioners,

v.

ROBERT JOHNSTON, *et al.*,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

STEPHEN I. SCHLOSSBERG
1125 Fifteenth St., N.W.
Washington, D. C. 20005

JOHN A. FILLION
M. JAY WHITMAN
8000 East Jefferson Ave.
Detroit, Michigan 48214

KATZ & FRIEDMAN
7 South Dearborn St.
Chicago, Illinois 60603

Counsel for All Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Counterstatement of the Question Presented	1
Counterstatement of the Case	2
Argument	6
Conclusion	10

INDEX OF AUTHORITIES

CASES:

Cort v. Ash, 422 U.S. 66 (1975)	7
Hood v. Barbers, 454 F. 2d 1347 (7th Cir 1972)	7
Johnson v. Nelson, 325 F. 2d 646 (8th Cir. 1963)	6, 7
Machinists v. Street, 367 U.S. 740 (1961)	2, 4, 5, 8
Marker v. Shultz, 485 F. 2d 1003 (D.C. Cir. 1973)	6
McNamara v. Johnston, 522 F. 2d 1157 (7th Cir. 1975)	5, 6, 8, 9
Phillips v. Osborne, 403 F. 2d 826 (9th Cir. 1968)	7
Pignotti v. Sheet Metal Workers, 477 F. 2d 825 (8th Cir. 1973), *cert. den.* 414 U.S. 1067 (1973)	6, 7
Pipefitters v. United States, 407 U.S. 385 (1972)	2, 8
Railway Clerks v. Allen, 373 U.S. 113 (1963)	2, 3, 4, 5-6, 8
Reid v. UAW Local 1093, 80 LRRM 2886, (ND Okla. 1972), *aff'd* 479 F. 2d 517 (10th Cir. 1973), *cert. den.* 414 U.S. 1076 (1973)	3, 6
U.S. v. Boyle, 482 F. 2d 755 (D.C. Cir. 1973), *cert. den.* 414 U.S. 1076 (1973)	7, 9
U.S. v. CIO, 335 U.S. 106 (1948)	8

STATUTES:

Corrupt Practices Act, 18 U.S.C. § 610	4, 7
Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 411 *et seq.*	1, 5
Title II, 29 U.S.C § 431 *et seq.*	
§ 201(c), 29 U.S.C. § 431(c)	4

Page

Title V, 29 U.S.C. § 501 *et seq.*

§ 501, 29 U.S.C. § 501 .....2, 4, 7, 8, 9

§ 501(a) 29 U.S.C. § 501(a) 1, 3, 4, 5, 6, 7, 8, 9

§ 501(b) 29 U.S.C. § 501(b) 1, 3, 4, 6, 7, 9

§ 501(c) 29 U.S.C. § 501(c) 4, 9

OTHER:

Restatement (Second) of Agency 9

A. Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L. Rev. 819 (1960) 8

R. Smith, *The Labor-Management Reporting and Disclosure Act of 1959,* 46 Va. L. Rev. 165 (1960) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-920

BERNARD W. McNAMARA, *et al.*,
Petitioners,

v.

ROBERT JOHNSTON, *et al.*,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The petitioners urged the Court below to expand federal jurisdiction by transmuting § 501(a) & (b) of the LMRDA[1] into a vehicle by which an individual union member can impose derivative damages on and secure injunctive relief against officers for certain ex-

---

[1] Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 USC § 411 *et seq.*, § 501, commonly known as the "Landrum-Griffin" Act.

penditures, even though those expenditures were authorized by the governing bodies of the organization.

Did the Seventh Circuit, in light of the legislative history of § 501 correctly *refuse* such an unprecedented expansion of federal jurisdiction, instead relegating the petitioners to remedies expressly provided by Congress elsewhere in the federal labor statutes, and by this Court in *Street* and *Allen*? [2]

COUNTERSTATEMENT OF THE CASE

Petitioners, plaintiffs below, seek *certiorari* from the unanimous decision of the Seventh Circuit, *per* Fairchild, C.J., affirming Judge William Bauer's dismissal of the Complaint for failure to state a claim.

The UAW's Constitution sets up UAW Community Action Progams (CAP).[3] In UAW Region 4, the Illinois State CAP Council has been established, along with a Greater Chicago Area CAP Council to administer these programs.[4] Subordinate bodies of the UAW,

---

[2] *Machinists* v. *Street*, 367 U.S. 740 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963).

[3] UAW Administrative Letter of May 19, 1969, attached as Exhibit A to the Complaint. The UAW has two parallel CAP structures—regular CAP, and V-CAP. UAW Voluntary CAP (UAW V CAP) is financed entirely by *voluntary* contributions *not* dues money and those contributions are expended for example on the making of federal political contributions. See *Pipefitters* v. *United States*, 407 U.S. 385. Regular CAP, here at issue, makes expenditures for other purposes and is financed by dues money, as explained below.

[4] The individual defendants herein are (or were) officers of the UAW and these CAP Councils. Robert Johnston is the Regional Director of the UAW Region 4, which includes Illinois. James Wright was Chairman of the UAW Chicago Area Community Action Program (CAP) Council. Gerald Peterson was the Secretary-

including Local 558, the petitioners' Local, were required to affiliate with the appropriate CAP Council.[5]

The regular UAW CAP structure is financed by 3% of monthly dues.[6] Expenditures are made by vote of the elected delegates to each CAP Council, or, between meetings, by the elected executive bodies of the Council. Any UAW Member who dissents from this use of his dues, has a right under Article 16 § 7 of the UAW Constitution to obtain a pro-rata rebate which includes the 3% of dues allotted to CAP, as well as other expenditures for political and ideological purposes.[7]

Disagreeing with the UAW Constitution, the petitioners filed suit under § 501(a) & (b) of the LMRDA, 29 U.S.C. § 501(a) & (b), seeking injunctive relief forbidding the organization's officers from spending funds for "partisan political activities" or "ideological causes" with which these particular plaintiffs disagree, and derivative damages from these officers for expenditures of this sort.[8]

Treasurer of the Illinois CAP Council. Emil Mazey is the Secretary Treasurer of the International Union, UAW. Leonard Woodcock is the President of the UAW. The UAW intervened as party defendant.

[5] UAW Administrative Letter of May 19, 1969, attached as Exhibit A to the Complaint. This requirement is now a part of the UAW Constitution, *see* Art. 37 §§ 1 & 2. All Locals are bound by the UAW Constitution, Art. 38 § 6. The Local 558 "nullification" resolution which the Petition emphasizes, pp. 3-4, was void *ab initio*.

[6] UAW Constitution, Art. 16 § 6.

[7] All that is required is a letter to the UAW's Secretary-Treasurer. *Reid* v. *UAW Local 1093*, 80 LRRM 2886, (ND Okla. 1972) aff'd 479 F. 2d 517 (10th Cir. 1973), *cert. den.* 414 U.S. 1076 (1973). *See: Railway Clerks* v. *Allen*, 373 U.S. 113, 123-124 (1963).

[8] Complaint, 2d & 3d prayers for relief and Count II ¶¶ 9-14.

The Complaint based jurisdiction solely upon the provisions of § 501(b) for alleged violations of the fiduciary requirements found in § 501(a) of the LMRDA. The Complaint, however, does not allege fiduciary violations by self-dealing, personal profit, fraud, misappropriation, or disobedience. Instead, it broadly attacks social expenditures as breaches of trust even where expressly authorized and commanded by the organization's constitution, and by directives of its governing bodies. Nor did the petitioners seek: an accounting under § 201(c) of the LMRDA, 29 U.S.C. § 431(c), the provision of the Act expressly tailored to that purpose;[9] a pro-rata rebate under the UAW Constitution, or its judicial equivalent, *Machinist* v. *Street,* 367 U.S. 740, 771-775 (1961), *Railway Clerks* v. *Allen,* 373 U.S. 113, 123-124 (1963); or criminal prosecution under § 501(c) of the LMRDA, 29 U.S.C. § 501(c), or the Corrupt Practices Act, 18 U.S.C. § 610, although they make unsupported conclusory assertions of criminal violation of the latter.

The Seventh Circuit affirmed Judge Bauer's dismissal of the Complaint, and rejected petitioners' assertion that, under § 501, an organization's officers are derivatively liable for civil breach of fiduciary duty simply because money is spent with authorization, but over the objection of some member of the organization.

---

[9] This is particularly curious in light of the tenor of the Petition, p. 7, where the petitioners suggest that their principal goal is an accounting. But the right to information is not at issue here. The Seventh Circuit held that the petitioners failed to state a claim under § 501. Accounting is a matter of remedy under § 501(b). Of course, that remedy is available only if a claim is stated first. Plaintiffs' stress on an accounting, therefore, begs the question. If information were their object, they would have pleaded § 201(c) and tried to meet that section's "just cause" requirement. They did not.

The Court below concluded, in conformity with the common law, that, absent adverse dealing, personal gain, disobedience, or the like, an officer's civil fiduciary duties must be tested by the authorization of his principal—here, the union "as a group," § 501(a), rather than some particular objecting member. 522 F. 2d at 1163. The Seventh Circuit grounded this conclusion, not only on the language of § 501, but also on careful examination of the legislative history of the LMRDA. 522 F. 2d at 1163, 1165.[10] Against this background, the Seventh Circuit examined *specific* provisions in the UAW Constitution and resolutions of the UAW Convention at length. 522 F. 2d at 1164. Finding adequate authorization in these, the Court below affirmed the District Court, refusing to permit a broad extention of federal jurisdiction.[11]

---

[10] As the Court below points out, there is a well-established distinction between conferring authority on an agent and attempting to excuse breaches of trust. 522 F. 2d at 1164 (quoting express legislative history).

[11] The Court below

> "deem[ed] it significant that the UAW has a rebate procedure whereby union members who object to CAP expenditures can recover a pro-rata share of that part of their dues allocated to the CAP program. Thus it cannot be said that the UAW leadership can arbitrarily spend CAP funds on political causes they alone favor at the expense of the views of the individual members. By the same token, union members such as plaintiffs who do not avail themselves of this rebate procedure appear at least tacitly to consent to CAP expenditures and to be in no position to claim a breach of trust." [522 F.2d at 1166.]

In *Street* and *Allen* this Court struck a delicate balance between the right of the majority to political and community activities, as against the right of dissenting individuals not to finance those activities. In both cases, the Court refused to enjoin the operation of union security provisions and instead held that individuals could recover a pro-rata rebate of dues spent over their objection. And the *Allen* Court urged unions to provide their own rebate

ARGUMENT

The Seventh Circuit rejected the petitioners' arguments through the following straight-forward, restrained analysis:

Congress, as evidenced by both the language of § 501 (a) and (b) and its legislative history, intended that section to incorporate the common law approach to fiduciary responsibility. The Complaint is devoid of allegations of adverse dealing, personal gain, disobedience of the principal and other such conduct. In the UAW's case, there is specific authorization from the principal for the conduct of which petitioners complain. So, under the established rules of agency, the agent officers cannot be held derivatively liable for the use of the organization's property, even in an unlawful manner, since the principal authorized the agent's conduct.[12]

Petitioners concede here, as they did in the Court below,[13] that this is purely a § 501(b) case:

> "It should be noted that plaintiffs here are not asserting any implied private cause of action to

---

procedures. See: 373 U.S. at 123-124; *Marker* v. *Shultz*, 485 F. 2d 1003, 1005 (D.C. Cir. 1973). The UAW was the first to provide a rebate system, now judicially approved. *Reid* v. *UAW Local 1093*, 479 F. 2d 517 (10th Cir. 1973), *cert. den.* 414 U.S. 1076 (1973). Here the petitioners did not use that rebate procedure. 522 F. 2d at 1166.

The Seventh Circuit therefore correctly refused to distort § 501 (a) & (b) into an unrestricted license to expand derivative actions which undo *Street* and *Allen*.

[12] Indeed *Johnson* v. *Nelson*, 325 F. 2d 646 (8th Cir. 1963), and *Pignotti* v. *Sheet Metal Workers*, 477 F. 2d 825 (8th Cir. 1973), *cert. den.* 414 U.S. 1067 (1973) suggest that if the officials had refused to make authorized expenditures for social or political purposes, the disobedience would subject them to suit under § 501(b).

[13] 522 F. 2d at 1165 n. 8.

> enforce 18 U.S.C. section 610. Their action seeks relief under 29 U.S.C. section 501(b) . . ." [Petition p. 10]

This concession, without more, makes irrelevant *Cort* v. *Ash*, 422 U.S. 66 (1975), the first question presented by the Petition, and the entire discussion at pp. 8-10 of the Petition. *Cort* unanimously rejects the attempt of stockholders, seeking both injunctive relief and derivative damages, to imply a private cause of action against corporate officers into 18 USC § 610. As the instant petitioners disavow any implied private action to enforce § 610, *Cort* is not germane. Their case must stand or fall strictly on § 501(a) & (b). The Seventh Circuit amply demonstrated that it falls.

Petitioners' arguments for granting the writ therefore comes down to two assertions: (i) that the federal courts have misunderstood the legislative history of § 501, and (ii) that this Court should find a conflict between the instant civil case and the criminal case of *U. S.* v. *Boyle*, 482 F. 2d 755 (D.C. Cir. 1973), *cert. den.* 414 U.S. 1076 (1973). Petitioners offer nothing else. We shall treat with these claims in order:

I

There is no reason for this Court to address the language and legislative history of § 501. The Circuits are in agreement.[14] The Seventh Circuit's reasoning here rests on a few unexceptionable principles:

---

[14] *E.g.*, *Hood* v. *Barbers*, 454 F. 2d 1347 (7th Cir. 1972); *Johnson* v. *Nelson*, 325 F. 2d 646 (8th Cir. 1963); *Pignotti* v. *Sheet Metal Workers*, 477 F. 2d 825 (8th Cir. 1973), *cert. den.* 414 U.S. 1067 (1973); *Phillips* v. *Osborne*, 403 F. 2d 826 (9th Cir. 1968).

The express language of § 501(a) imposes a fiduciary duty in favor of the union "as a group." This disposes of the petitioners' argument that disregard for the wishes of any objecting member breaches the duty.

Congress intended § 501 to impose on union officers the common law standards of fiduciary duty, therefore, in the absence of adverse dealing, personal gain, or disobedience of the principal, the test is authorization by the principal. Allegations of such misconduct are absent here, so the Court below quite properly turned to the matter of authorization, delving into a body of union provisions and resolutions unique to the UAW, but of no general significance, and on the basis of these, determined that the expenditures were authorized.

And, finally, the legislative history of § 501 disavows any intent to prohibit union involvement in politics. This is not only patent in Senator McClellan's remarks [15] but a union's right to do so has been repeatedly confirmed by this Court.[16] This answers the claim that political spending is a *per se* violation of fiduciary duty.

---

[15] The Court below properly paid particular heed to the remarks of Senator McClellan, the chief proponent of the fiduciary responsibility provision, who assured Senator Kennedy that § 501 was not intended to interfere with COPE. 522 F. 2d at 1165. Petitioner's assertion, p. 11, that the Seventh Circuit relied on the opponents of § 501 is flatly wrong.

[16] *E.g.*, *Pipefitters* v. *United States*, 407 U.S. 385 (1972); *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963); *Machinists* v. *Street*, 367 U.S. 740 (1961); *U.S.* v. *CIO*, 335 U.S. 106 (1948). The commentators agree: A. Cox, *International Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 828-9 (1960); and R. Smith, *The Labor Management Reporting and Disclosure Act of 1959*, 46 Va. L. Rev. 165, 228 (1960).

The Seventh Circuit's reading of § 501 and its history, thus, merely confirms well-settled law. The lower Courts ultimate conclusions, while based on those interpretations, turn on a body of UAW authorizations of no general significance beyond this case.

II

Last, the Seventh Circuit's discussion of *U.S.* v. *Boyle,* 482 F.2d 755 (D.C. Cir. 1973), *cert. den.* 414 U.S. 1076 (1973), is grounded on long established principles. 522 F.2d at 1165 n.10. *Boyle* was a criminal case under a distinct provision, § 501(c).[17] *Boyle* held that authorization cannot insulate an agent from criminal liability. But in this civil case, as between agent and principal, "fundamental fairness requires that an agent not be held for the use of the principal's property in an unlawful manner when it is reasonable to infer that the principal authorized the agent's conduct." 522 F.2d at 1165. Thus, while authorization is not a defense to criminal liability, it will defeat civil recovery by the principal. In so holding, the Seventh Circuit followed the common law agency rules set out in the Restatement (Second) of Agency. 522 F.2d at 1165-1166.

---

[17] Although part of § 501, § 501(c) contains its own recitation of duty; it does not rely on the recitation of duty in § 501(a), as does § 501(b).

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

STEPHEN I. SCHLOSSBERG
1125 Fifteenth St., N.W.
Washington, D. C. 20005
(202) 296-7484

JOHN A. FILLION
M. JAY WHITMAN
8000 East Jefferson Ave.
Detroit, Michigan 48214
(313) 926-5216

KATZ & FRIEDMAN
7 South Dearborn St.
Chicago, Illinois 60603
(312) 263-6330

Counsel for All Respondents

Dated: January 26, 1976.